COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Complaint of Verizon Massachusetts Concerning Customer Transfer Charges Imposed By Broadview Networks, Inc.	)	**D.T.E. 05-XX**

COMPLAINT OF VERIZON MASSACHUSETTS CONCERNING CUSTOMER TRANSFER CHARGES IMPOSED BY BROADVIEW NETWORKS, INC.

Pursuant to 220 C.M.R. § 1.4, Verizon Massachusetts ("Verizon MA") files this Complaint against Broadview Networks, Inc. ("Broadview") regarding the application of "Service Transfer Charges," as contained in Section 9.1.1 of Broadview's Access Services Tariff (M.D.T.E. Tariff No. 2).[1] As demonstrated below, those charges are unjustified because Broadview does not sell and Verizon MA does not request, purchase, or need any *wholesale* services from Broadview in connection with the transfer of a retail customer's service *to* Verizon MA.

In addition, Broadview has provided no cost support to justify imposing Service Transfer Charges on Verizon MA because Broadview incurs no costs chargeable to Verizon MA as part

[1] An excerpt from Broadview's Tariff is provided as Exhibit I to this Complaint. This Complaint is submitted without prejudice to, and Verizon MA specifically reserves, any claim it may have that the Tariff, even if found valid by the Department, may not be applied to Verizon MA under the provisions of its interconnection agreement with Broadview. Verizon MA does not seek to resolve that issue here and reserves its rights to pursue it in an appropriate proceeding. In addition, although Broadview is named as the respondent to this Complaint, if any change in the identity of the party issuing the Tariff should occur as a result of a series of transactions that will result in the common ownership of Broadview and another CLEC, Verizon requests that the appropriate party be substituted for Broadview as respondent.

of the transfer. Accordingly, the Department should direct Broadview to cancel the service transfer provisions of its tariff. Pending a resolution of this complaint, the Department should immediately establish a temporary rate of zero. Such action is warranted here in view of the evidence that the rates in question are unlawful, unjust, unreasonable, and contrary to public policy.

STATEMENT OF FACTS

1. Verizon MA is a common carrier offering intraLATA telecommunications services, including exchange and exchange access services, in the Commonwealth of Massachusetts.

2. Broadview is a registered common carrier in the Commonwealth that provides exchange service and other services to end-user customers under tariffs subject to the Department's jurisdiction.

3. On August 22, 2003, Broadview filed to amend its Massachusetts Tariff (the "Broadview Tariff") to assess Service Transfer Charges

> …against a requesting local carrier when a customer disconnects local exchange service from the Company and switches to the requesting local exchange carrier. This charge is applied on a per-line basis for each Local Service Order Request received by the Company [Broadview].

See Broadview Tariff, Sec. 9.1. That change became effective on September 22, 2003. That Tariff appears to impose such charges on Verizon MA when a Broadview customer switches to Verizon MA.[2] The applicable per line charges can range from $1.02 for "Electronic Processing" to $15.39 for "Manual Processing." *Id*. at Sec. 9.1.1.

[2] For purposes of this Complaint, Verizon MA has assumed, *arguendo*, that the Broadview Tariff in fact applies to Verizon MA. However, it should be noted that the Tariff as a whole is subject to certain

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SUMMARY OF CLAIM

1. Chapter 159, Section 17 of the Massachusetts General Laws requires that

> [a]ll charges made, demanded or received by any common carrier for any service rendered or performed, or to be rendered or performed by it or in connection therewith in the conduct of its common carrier business … shall be just and reasonable … and every unjust or unreasonable charge is hereby prohibited and declared unlawful …

Mass. Gen. Laws. c. 159, § 17. Broadview's Service Transfer Charges do not meet that "just and reasonable" standard.

2. The charges at issue here are not proper wholesale charges. In sharp contrast to Broadview's Service Transfer Charges, the wholesale charges that Verizon imposes on other local exchange carriers are based on specific wholesale services that it provides to those carriers on request: services such as providing unbundled access to certain network elements, or

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> "General Regulations" set forth in Section 1 thereof. Those regulations state that "[t]his tariff contains regulations, rates and charges applicable to the provision of access services by Broadview Networks, Inc. to Customers." Under this overarching provision, the Service Transfer Charges set forth in § 9.1 of the Tariff would not apply to Verizon MA. *First*, Broadview is not providing any "access service" to Verizon. *Second*, Verizon is not a "Customer" of Broadview, since that term is defined in § 1.2 of the Tariff as referring to an entity "which subscribes to the services offered under this tariff, including both Interexchange Carriers and End Users." Verizon MA, of course, is not an interexchange carrier with respect to the "service transfers" at issue here, is not an end user, and does not "subscribe" to any Broadview services in connection with Service Transfers. (The definition of "End User" in § 1.2 specifically excludes carriers, except to the extent that they use service for administrative purposes.)
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> Verizon MA has no doubt that Broadview *wants* to apply these charges to Verizon MA because Broadview has already billed Verizon for the charges, however the legal effect of the tariff is not determined by Broadview's intentions, but by the language of the tariff. In view of a number of considerations — the dubious legality of the charges (if applied in the manner that Broadview desires), the ambiguity created by the General Regulations, the fact that Broadview sought to include in its "access" tariff charges unrelated to access (thus in effect concealing those charges from potentially affected entities), and the fact that Broadview itself drafted the tariff language — the standard *contra proferentum* rule (interpretation against the position advocated by the party who drafted the document) should be applied to interpret the Service Transfer provisions of the Tariff as inapplicable to Verizon MA, and Verizon objects to the charges on this ground as well. In any event, Broadview is purporting to apply the charges to Verizon MA, so the Department should either conclude that they are *not* applicable, or else declare them unlawful.

establishing interconnection arrangements, or terminating local traffic, or providing services for resale to a CLEC's end-user customers. Here, in contrast, Broadview's Tariff does not purport to identify any *service* that Broadview is providing to Verizon MA. Rather, the Tariff states that the charge is imposed whenever an end-user customer "disconnects local exchange service from [Broadview] and switche[s] to" Verizon MA. Thus, Broadview's Service Transfer Charges are triggered simply by the *event* of a Broadview end-user customer transferring service to another local exchange company. Absent a linkage to a wholesale – or any other – service requested by or provided to Verizon MA, there is no basis for Broadview to impose *any* charge on Verizon MA.[3]

3. Broadview has failed to demonstrate any cost-based connection between its Service Transfer Charges and a legitimate *wholesale* function it performs. Through those charges, Broadview simply seeks to penalize local exchange companies, such as Verizon MA, from competing successfully with Broadview. The charges are thus an unlawful customer transfer charge that is anti-competitive both in intent and in effect.[4] Moreover, by placing

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[3] Verizon MA imposes wholesale charges *only* when it performs a wholesale service in connection with the transfer of an end-user customer to another local exchange company. For example, when a Verizon MA customer switches to a CLEC that is *not* fully facilities-based, and that seeks to serve the customer using Verizon MA's loop (and its own switch), Verizon MA performs the wholesale service known as a "hot cut" in order to provide the CLEC with access to the loop. The charges imposed by Verizon MA in such a case apply to, and recover the cost of, the *hot cut*, not the customer transfer. However, when a customer chooses to migrate from Verizon MA to a fully facilities-based CLEC that is prepared to serve the customer using its own loop and switching facilities, Verizon MA does not impose any charges on that CLEC, even though Verizon may incur certain administrative and other costs in connection with the migration. In other words, Verizon MA, unlike Broadview, does not seek to collect wholesale charges for the bare act of relinquishing a customer.

[4] Similar charges imposed by CLECs have been rejected by other state commissions. For example, the New York Public Service Commission ("NYPSC") denied customer transfer charges imposed by TC Systems Inc. (a subsidiary of AT&T Communications). Case 03-C-0636, *Complaint of Verizon NY Inc. Concerning Transfer Charges Imposed by TC Systems, Inc.*, Order Granting Verizon's Petition and Complaint (issued and effective February 13, 2004); *see also* Order, at 5-6 (January 21, 2004). In that decision, the NYPSC found that Verizon "does the lion's share of the physical network activity necessary for a customer transfer," and that TC Systems' costs "are more appropriately recovered, if they are not already, in retail

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unreasonable barriers in the path of end-user consumers who wish to switch carriers, the charges are also anti-consumer. Accordingly, Broadview's attempt to recover in wholesale rates the costs that it claims to incur in connection with customer transfers to other service providers must be rejected.[5]

4. The type of "service transfer" costs that Broadview claims to incur are properly regarded as retail costs that should be recovered, if at all, in retail rates or absorbed by Broadview as a general cost of providing retail service. The fact that any costs actually incurred by Broadview in connection with customer transfers are properly treated as *retail* charges is demonstrated by the fact that Broadview would incur essentially the same costs if the customer moved to another state, discontinued wireline service, or otherwise disconnected from

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rates, or in upfront connection charges, but not in a separate charge, such as TC System's customer transfer charge." *Id*. at 5-6.

Likewise, the Pennsylvania Public Utility Commission ("PAPUC") promptly suspended the customer transfer tariff filed by AT&T's Teleport subsidiaries, TCG Delaware Valley, Inc. and TCG Pittsburgh, Inc., and concluded that the tariff "may result in a barrier to entry." *See, e.g., Pennsylvania Public Utility Commission v. TCG Delaware Valley, Inc.*, Docket Number R-00027928, Order (December 19, 2002). TCG opted to withdraw the tariff as an alternative to suspension and the commencement of an investigation. Since the Pennsylvania and New York orders were issued, CLECs have voluntarily withdrawn such tariffs in a number of other states.

5 In a letter sent by its counsel to Verizon, Broadview argues that its position is supported by an order issued by the FCC's Wireline Competition Bureau ("WCB") in an arbitration between Cavalier and Verizon's Virginia affiliate. In fact, the only legal or regulatory principle established by that order is that "[t]o the extent that Cavalier has demonstrated that it performs tasks comparable to those performed by Verizon, it would violate section 251(c)(2)(D) to allow Verizon to assess a charge on Cavalier but disallow a comparable charge by Cavalier on Verizon." *Petition of Cavalier Telephone LLC Pursuant to Section 252(e) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc. and for Arbitration*, WC Docket No. 02-359, Memorandum Opinion and Order (rel. December 12, 2003), ¶ 189 (footnote omitted).) However, as discussed below, Broadview's charge is not "comparable to" any Verizon charge; thus, the principle announced by the WCB simply has no application here. The *factual* finding made by the WCB on the basis of a somewhat ambiguous and unclear record — that "Cavalier's work in connection with a Verizon winback is similar in purpose and scope to the work that Verizon is responsible for performing when Cavalier submits a local service request to Verizon to move a customer from Verizon to Cavalier" (*id.* ¶ 204) — is simply incorrect, and is the subject of a pending petition for reconsideration and clarification.

Broadview without opening a new account with another carrier. In view of this fact, the costs Broadview seeks to collect have nothing to do with the fact that Verizon MA is becoming the customer's service provider. Rather, the sole necessary and sufficient cause of the costs is the customer's decision to cease using Broadview as a service provider. Relinquishing a customer upon the customer's request, so that he or she may change service providers, is an obligation that Broadview owes, and a service that it provides, to its retail customers. Accordingly, any allowable costs associated with such relinquishment should *not* be recovered from the succeeding service provider (*e.g.*, Verizon MA).[6]

5. Even if Broadview were to be permitted as a general matter to recover its "service transfer" costs through wholesale charges — which it should not — Broadview would still bear the burden of demonstrating that the *level* of its service transfer charges is just and reasonable pursuant to Chapter 159, Section 17 of the Massachusetts General Laws. However, it has failed to make any showing sufficient to meet that burden.

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[6] In a similar proceeding, the NYPSC ruled that

> [Teleport] has not shown that these costs, other than [Customer Service Record] costs which are negligible, warrant explicit recovery. The service customer coordination of discontinuing billing is clearly a retail function. If a customer were simply to disconnect its retail service [Teleport] would have to review an order form and perform some coordination activities and administrative tasks such as updating databases. These retail costs are traditionally recovered in retail rates. In contrast to [Teleport's] rate design, Verizon recovers many of the disconnect costs associated with its activities through a non-recurring charge imposed at the time of installation. Therefore, supported customer transfer costs are more appropriately recovered, if they are not already, in retail rates, or in up front connection charges, but not in a separate charge, such as [Teleport's] customer transfer charge.

Case 03-C-0636, *Complaint of Verizon NY Inc. Concerning Transfer Charges Imposed by TC Systems, Inc.*, Order at 5-6 (January 21, 2004) ("*Teleport Order*").

6. In applying the § 17 standard, CLEC wholesale rate filings are entitled to no greater deference than similar Verizon MA filings. Although CLECs' *retail* rates and tariffs generally may be subject to less stringent procedural requirements and less searching substantive review than Verizon MA's rates and tariffs, the rationale for such a distinction — the competitive nature of the services offered and the non-dominant nature of the carrier — does not carry over into the wholesale sphere. Verizon MA — and other competitors of Broadview — literally have no other place to go to obtain the relinquishment of a Broadview customer who wishes to transfer to another carrier. In that limited domain, Broadview is a, indeed *the*, dominant carrier, and it cannot be allowed to use the market power that accrues to that status to disadvantage its competitors or obstruct an end-user's decision to change carriers. Whatever a CLEC's *retail* market share, it is the only game in town insofar as the relinquishment of a customer who wishes to change carriers is concerned.

7. Broadview has utterly failed to meet its burden of justifying its rates by identifying and quantifying the costs it seeks to recover. So far as Verizon MA is aware, Broadview has filed no cost study in support of its proposed rates. Indeed, the sole justification that Broadview has offered to Verizon MA for the level of its service transfer rates is that "the rate contained in the [Broadview] tariff does not exceed the comparable rate charged by Verizon," and it is therefore "presumed to be reasonable."[7] Superficially plausible as this theory may be, it is in fact totally fallacious since there is no "comparable" Verizon MA charge for the same or similar services.

[7] This argument was made in a letter to Verizon from counsel for Broadview.

8. As explained previously, when a customer migrates from Verizon MA to a fully facilities-based carrier (which is the precise counterpart of the situation in which a customer migrates from Broadview to Verizon MA), Verizon MA does not impose any charges at all on the carrier for processing this "naked" service order because no specific, underlying wholesale services – such as loops - are ordered or provided. Therefore, if Broadview were truly adopting Verizon MA's rates for providing the same functions or services — rather than simply plucking numbers out of Verizon MA's tariff[8] — then it would not impose *any* charge at all for a service transfer.

9. In the absence of the identification and adoption of a *comparable* Verizon MA rate, Broadview should be required to justify its Service Transfer Charges by specifically identifying the precise costs that it seeks to recover and by demonstrating the amount of those costs.[9] However, it has failed even to attempt to do this – making it impossible for the

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[8] The two numbers that Broadview has chosen to pluck from Verizon MA's tariff are $1.02, which is the level of a non-recurring Service Order Charge that Verizon imposes when a CLEC orders certain Verizon wholesale services, and $15.39, a Verizon "Manual Intervention" surcharge that applies when orders for certain wholesale services are submitted other than through the standard electronic interfaces. Broadview identifies the former as its current "Electronic Processing" service transfer charge, and the latter as its "Manual Processing" service transfer charge. Broadview Tariff, Sec. 9.1.1.

The level of Verizon MA's rates has no connection with any of the costs that Broadview might claim to incur because the costs underlying Verizon MA's rates do not include any costs for *disconnecting* a customer's service. Moreover, the Verizon MA rates, when they apply at all, apply on a per-order basis, not on a per-line basis, as Broadview's Tariff specifies. Finally, unlike Verizon's tariff, Broadview does not define the circumstances under which the "Manual Processing" charge would apply. Verizon's charge is limited to situations in which CLECs fail to use the available electronic ordering system to place an order for service. *See* Verizon Tariff M.D.T.E. No. 17, Pt. A, § 3.3.2.

[9] For example, to the extent that Broadview seeks to justify the charge in terms of the costs it incurs in releasing a ported number, the Federal Communications Commission ("FCC") has made it clear that such costs are properly classified as "customer-specific costs directly related to providing number portability," and that the FCC has exclusive regulatory jurisdiction over rates set to recover such costs. *See Telephone Number Portability*, CC Docket No. 95-116, Third Report and Order, 13 FCC Rcd 11701 (rel. May 12, 1998), ¶¶ 28, 29, 38, 72; *Telephone Number Portability*, CC Docket No. 95-116, Memorandum Opinion and Order on Reconsideration and Order on Application for Review, 17 FCC Rcd 2578 (rel. February 15,

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Department to determine whether those charges are just and reasonable. Further, Broadview should be required to demonstrate that the costs at issue are proper wholesale charges, and that they are not *already* recovered in the charges that it imposes upon its retail customers. It would be surprising if Broadview's retail rates did not make some provision for the disconnect costs that it would ultimately incur when a customer leaves it — whether to transfer to another carrier or for some other reason. Assuming that this is the case, imposition of an additional wholesale "service transfer" charge would impermissibly allow Broadview to double-recover its costs. Broadview has the burden of demonstrating that such double-recovery will not occur.[10]

10. In conclusion, Broadview provides no *wholesale* service to Verizon MA in connection with the transfer of a Broadview end-user customer to Verizon MA, and Broadview cannot impose a charge for the bare event of a "customer transfer." Moreover, Broadview has not identified any "comparable" Verizon charges that it is adopting, and it has not submitted any independent evidence that its charges bear a reasonable relationship to its costs. It has, therefore, failed to meet its statutory burden of demonstrating that the rates it has filed are "just and reasonable" under Massachusetts law.[11] Accordingly, the Department should issue an order

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2002), ¶¶ 9-12. Thus, such costs may not be recovered through tariffed intrastate charges such as those at issue here.

[10] *See e.g.*, *Teleport Order* at 5-6 (". . . supported customer transfer costs are more appropriately recovered, *if they are not already*, in retail rates . . . .). (Emphasis supplied.)

[11] Contrary to a claim made by Broadview's counsel in a letter to Verizon, the charges in question are not "'*per se* reasonable and unassailable in judicial proceedings' under the filed rate doctrine." The filed rate doctrine has no relevance to the Department's power to find that a tariff or rate is unjust and reasonable, and to direct a carrier to change or eliminate the rate prospectively.

eliminating the Service Transfer Charges from Broadview's Tariff. or set them at zero.

RELIEF REQUESTED

1. Broadview's Service Transfer Charges clearly lack any relationship to any wholesale service that Broadview provides to Verizon MA or to any costs that Broadview incurs on Verizon MA's behalf for the transfer of customers. Accordingly, Verizon MA requests that the Department immediately institute a proceeding and convene a hearing in accordance with 220 C.M.R. § 1.6 and Massachusetts General Laws c. 159, §§14 and 17 to review the validity of the Service Transfer Charges imposed by Broadview.

2. Verizon MA requests that the Department find in that proceeding that Broadview's Service Transfer Charges are unjust and unreasonable under Massachusetts General Laws. c. 159, § 17.and enter an order invalidating such charges as unlawful or reducing them to zero.

CONCLUSION

As set forth above, Broadview provides no *wholesale* service to Verizon MA in connection with the transfer of a Broadview end-user customer to Verizon MA, and Broadview cannot impose a charge for the bare act of a "customer transfer." To the extent that Broadview does claim to incur costs in connection with service transfers, those costs are solely its own retailing costs. However, even if it were generally proper to recover "service transfer" costs in wholesale rates — which it is not — Broadview would still bear the burden of demonstrating that the *level* of its service transfer charges is just and reasonable.

Broadview has made absolutely no showing of the magnitude of those costs and has failed to demonstrate that its rates do not double-recover costs that are already recovered through Broadview's existing retail charges. Broadview's Service Transfer Charges thus violate the "just

and reasonable" standard under Section 17 of Massachusetts General Law. Accordingly, the rates in question should be eliminated, or "fixed" at zero.

Respectfully submitted,

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